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VIDEO EVIDENCE, TRIERS OF FACT AND THE QUEST FOR TRUTH

Understanding Why Video Evidence Is Deceptive and Misleading and Often Undercuts the Value of Eyewitness Testimony

By Michael P. Stone, Esq.

A court trial this week in yet another fatal officer involved shooting case in Los Angeles, featured a familiar conflict in the evidence: officer eyewitness testimony vs. news and bystander video. We have faced this many times before over the past 24 years, since the *Rodney King* trials.

It would be a good thing if, in at least *most of the cases*, the video evidence is unequivocal and supports the officers' versions of how the event unfolded, or what the decedent did or was doing at the time of the shooting. In these circumstances, we say that "the officer's perception upon which he or she acted was consistent with the video recording", or "the video evidence validated the officer's testimony".

Unfortunately, the quality of most video evidence does not permit such sweeping conclusions. The greater the differences in position, direction, elevation, lighting, recording speed, volume, angles and so on between officers and camera usually means the greater discrepancies in officers' versions as testified to, and the videos admitted in evidence.

Juries will normally rely more heavily on what *they can see*, for example in a video snippet, than what they hear from a witness or party who testifies in a case. For this reason, we say that video is the more "compelling" evidence, in contrast to witness or party testimony. "*Compelling evidence!*" We are accustomed to hearing litigators plead their cases before judges and juries and freely toss around this conclusory phrase and so, vouching for the qualities of the evidence in the case, conclude that the weight and quantum of the evidence produced can lead to only one conclusion. On the other hand, I often remark that "*video evidence is compelling*" because the average lay juror embraces it. I do not mean to say that it is "compelling" in the larger sense of the word – that is, that it is so highly probative it cannot be disregarded. Used here, we say video evidence is

"compelling" because lay jurors regard it that way, often giving it greater weight than it is due, compared to eyewitness testimony. Can *compelling evidence* be, at the same time, *misleading*? Can *compelling evidence* be *deceptive*? When lay jurors are told, "you are going to see a *video recording* of the actual event that *caught these officers*…"; the stage is set for disbelief in the *officers'* testimony and reports wherever they are *contradicted* (*or not validated*) by the video recordings.

Police defense litigators approaching trial in a case where there is video must carefully analyze the video recordings against the backdrop of eyewitness and police reports and testimony. Sometimes the recording will contradict statements made. Other times they may not directly contradict the statements, but they do not *validate* the statements because, for example, the camera did not have the occurrence or event in its field of view. Every such "discrepancy" needs to be identified and accounted for, well before trial so that lay jurors are not left to decide for themselves why there is a discrepancy. *They have to "see" what is there and what is not there*.

But for the same reason, a juror is more likely to conclude that something did not happen, if it cannot be seen in a video admitted in evidence, and yet, we know that because of all the limitations on video evidence, it may not show something that in fact occurred. If there is a video view of a police confrontation where the camera is not in a position to clearly record the same view as the officer is experiencing, and where a significant event occurs in the officer's perception that is not recorded in the video account, we have the risk of disbelief in the officer's testimony or at least rejection of the testimony as inaccurate, if not false.

Finding the truth in a litigated case such as these often depends on the officer's counsel's success in getting the judge or jury to accept police testimony that is not validated by video recordation. That success is directly connected to the effectiveness and "believability" of the officer's testimony. The officer's testimony at trial is formed based upon the officer's initial investigatory statements and reports. So, like dominoes, the testimony falls this way or that because of the officer's initial accounts. In these circumstances, the initial interviews of officers and preparation of their earliest reports are "critical stages" of the case, demanding the utmost in care, time preparation and devotion to detail, as any that the officers will complete or participate in making. Recognize that every discrepancy between what is seen or not seen in video and what is said in reports and testimony will be underscored and accented at trial, leading potentially to an unjust result or catastrophic verdict.

It is partly a question of timing. In a violent and rapidly evolving dynamic confrontation "caught" on video officers should never be compelled to make any statements of record without a full opportunity to study all available video recordings. Otherwise, the officers may blindly walk into a complicated trap for the unwary. Their honest perceptions and memory of the event *are their reality*, regardless of what the video shows or does not show. Obvious discrepancies have to be confronted at the outset and resolved to the greatest extent possible.

All of this debate over the past few years regarding policies related to not permitting officers to view videos of events until after they have made detailed statements, ignores the reality of this

situation, and vicissitudes of conflicts between testimony and video in litigated cases. It is plainly unfair to the witness officer and undermines even thoroughly honest testimony.

Since *Graham v. Connor* (1989) 490 U.S. 386, the courts have emphasized that police use of force is to be judged according to the "reasonable officer on the scene, in the same or similar circumstances" standard. Would a reasonable officer in the same situation respond in the way that the subject officers did? Triers of fact, in order to answer these questions, must as nearly as possible, "stand in the shoes" of the officers confronting the situation, and understand their training, experiences, perceptions, assessments, fears and responsive reactions, in order to follow the law and do the jurors' job.

In the ever-more rare dynamic police force case where there is no video, critics say "police own the narrative." In other words, police testimony dominates what the jurors hear and learn at trial. And, to the extent the "police narrative" is fabricated to cover-up wrongdoing, officers guilty of serious misconduct or even homicide, may "get away with it." Hence, people in contact with the police or witnesses are encouraged to video record everything. But it is impossible to record everything that is significant, especially if the recording does not present the officers' viewpoint. If the recording does not fairly present the officers' view, it does not help anyone "stand in the shoes" of the officers at the time.

Our Supreme Court in *Graham v. Connor*, *supra*, instructed that we are not to employ 20-20 hindsight clarity in evaluating officers' actions in a violent confrontation at the time they acted. I always argue in these cases that, "frame-by-frame, pinpoint, enhanced, slow-motion video analysis in these incidents in the calm environment of the courtroom is tantamount to '*employing 20-20 hindsight in spades*'. The officers' perception and memories are their reality; not what can be seen or not in a video."

The case of *Aipperspach v. McInerney*, 766 F.3d 803 (8th Cir. 2014), is instructive. In *Aipperspach*, a news helicopter circling overhead captured the police incident on video. The plaintiff in *Aipperspach* did not directly contest the testimony of the officers, but instead, presented the video of the incident taken from above the scene by the helicopter. The District Judge commented that the video,

> "does not answer the question of whether the officers' actions were 'objectively reasonable' from the perspective of those on the ground. Rather, the video provides only the aerial perspective of the person who recorded it. Moreover, the Court's viewing the video over three years later is precisely the kind of hindsight judgment ... the United States Supreme Court ha[s] cautioned against." (*Aipperspach v. McInerney*, 963 F.Supp.2d 901, 908 (August 2, 2013, W.D. Mo.).)

The District Judge further noted,

> "technology now allows the Court to travel back in time to determine whether decisions were reasonable in hindsight does little to affect the reasonableness of decisions in the moment. Accordingly, the video and picture evidence does

> nothing to controvert the testimony of numerous officers that they believed that [the suspect was] endangering their lives." (*Id*. at 909.)

Affirming the judgment, the Court of Appeal noted that "'the inquiry here is ... whether, from an objective viewpoint and taking all factors into consideration, [each defendant officer] reasonably feared for his life' or the lives of his fellow officers. *Wilson v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995). The video taken from high above the scene sheds no material light on that question." (*Aipperspach*, supra, at 808.)

Reviewers of violent, rapidly-developing police confrontations after the fact, whether they be judges, juries, civil service commissions, arbitrators or police use of force review panels, are required to follow the *Graham v. Connor* analysis, utilizing the "reasonable officer on the scene at the time" standard to evaluate police actions. Video recordings of the event pose a serious risk to a proper outcome by the temptation they pose to apply the clarity of 20-20 hindsight in the review process. Video evidence that does nothing to assist the process of evaluating the officers' actions at the time should be disregarded in favor of eyewitness testimony.

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